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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

EMERSON INSTITUTE, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Counsel, on behalf of Emerson Institute, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above case on February 8, 1966. Appellant's motion in the Court of Appeals for a rehearing was denied March 3, 1966.

OPINIONS BELOW

The United States District Court for the District of Columbia rendered no opinion in granting defendant's motion for summary judgment. The opinion of the United States Court of Appeals for the District of Columbia Circuit affirming the Trial Court (App., *infra*, pp. 1a-4a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered February 8, 1966, (App., *infra*, p. 5a) and a *per curiam* Order denying a petition for rehearing was entered March 3, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(i).

QUESTION PRESENTED

For the purpose of collecting FICA (employment) taxes, can an *ultra vires*, illegal and legally ineffective act of the trustees of a non-profit corporation organized under the laws of the District of Columbia to operate an educational institution destroy the non-taxable status of the corporation which is granted by the Internal Revenue Code of 1954?

STATUTES INVOLVED

DISTRICT OF COLUMBIA CODE, 1961 EDITION:

§ 29-701. *Dissolution—Voluntary—Application to District Court.*

When a majority of the trustees, directors, or other officers having the management of the concerns of any corporation in the District, or stockholders representing not less than one-third of the capital stock of any such corporation, discover that the property and effects of the corporation have been so far reduced, by losses or otherwise, that it will not be able to pay all just demands against it or offer a reasonable security to those who deal with it, or they shall deem it beneficial to the interests of the stockholders that the corporation be dissolved, or when such directors, trustees, or other officers are authorized by a majority of the stockholders to apply for a decree, as hereinafter provided, or when the objects of the corporation have wholly failed or are entirely abandoned or are impracticable, they may apply to the United States District Court for the District of Columbia by petition for the dissolution of said corporation. (Mar. 3, 1901, 31 Stat. 1316, ch. 854, § 768; June 25, 1936, 49 Stat. 1921, ch. 804; June 25, 1948, 62 Stat. 991, ch. 646, § 32(b); May 24, 1949, 63 Stat. 107, ch. 139, § 127.)

§ 29-702. *Contents of application.*

Such application shall contain a statement of the reasons upon which it is founded, and there shall be annexed thereto—

First. A full, just, and true inventory of all the estate, real and personal, of the corporation, and of all the books, vouchers, and securities relating thereto.

Second. A full, just, and true account of the capital stock of the corporation, specifying the names of the stockholders, their residences, when known, the number of shares belonging to each, the amounts paid in upon said shares, respectively, and the amounts still due thereon.

Third. A statement of all the incumbrances on the property of the corporation and of all the engagements entered into by it which have not been fully satisfied or cancelled, specifying the place of residence of each creditor and of every person to whom such engagements were made, if known, the sum owing to each creditor and the nature and consideration of the indebtedness, and such application shall be verified by affidavit. (Mar. 3, 1901, 31 Stat. 1317, ch. 854, § 769.)

§ 29-703. *Order to appear—Notice.*

On the filing of such application, accounts, inventories, and affidavit, an order shall be passed requiring all persons interested in said corporation to appear in said court and show cause by a day named, if any they have, why it should not be dissolved, and a notice of said order shall be published in some newspaper of general circulation weekly for three successive weeks, the first insertion to be not less than one month before the day fixed for showing cause as aforesaid. (Mar. 3, 1901, 31 Stat. 1317, ch. 854, § 770.)

§ 29-704. *Reference to take testimony.*

Whether answer be made or not, the cause shall be referred to the auditor, who shall take testimony in relation to the allegations of the petition, and report to the court, with all convenient speed, with a statement of the property

and effects, debts, credits, and engagements of the corporation and all other matters relative to the issues in said cause. (Mar. 3, 1901, 31 Stat. 1317, ch. 854, § 771).

§ 29-705. *Decree of dissolution.*

If it appear to the court that the corporation is insolvent, or that a dissolution thereof would be beneficial to the stockholders and not injurious to the public interests, or that the objects of the corporation have wholly failed or been abandoned or are impracticable, a decree shall be entered dissolving the corporation and appointing one or more receivers of its estate and effects; and the corporation shall thereupon be dissolved and cease to exist. (Mar. 3, 1901, 31 Stat. 1317, ch. 854, § 772.)

INTERNAL REVENUE CODE OF 1954:

SEC. 501. EXEMPTION FROM TAX ON CORPORATIONS, CERTAIN TRUSTS, ETC.

(a) *Exemption From Taxation.*—An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under sections 502, 503, or 504.

* * * * *

(c) *List of Exempt Organizations.*—The following organizations are referred to in subsection (a):

* * * * *

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

* * * * *

STATEMENT*

A Certificate of Incorporation of petitioner as a non-profit corporation to conduct an educational institution in the District of Columbia was filed in the office of the Recorder of Deeds of the District of Columbia on May 15, 1941 (Ch. 8 of Title 5, now Ch. 4 of Title 29 of the D.C. Code). The Treasury Department of the United States, through its Internal Revenue Service, ruled on June 22, 1945, that petitioner was exempt from federal income and employment taxes under the Internal Revenue Code. On September 28, 1946, the then trustees of petitioner, Fred P. Myers and John J. Humphrey, executed and caused to be recorded documents entitled "Certificate of Dissolution" and "Agreement of Partnership", which documents purported to dissolve petitioner and to create a partnership to continue the operation of petitioner as a non-profit educational institution. No action was instituted or prosecuted under applicable law to dissolve the corporation (Ch. 7 of Title 29, D.C. Code). Mr. Myers died on October 26, 1953, and on April 15, 1954, his widow as executrix of his estate, entered into an agreement for the sale of Mrs. Myers' and her testator's interest in the partnership to Mr. Humphrey. On October 25, 1954, a bill of sale of Mr. Myers' interest to Mr. Humphrey was executed by Mrs. Myers, and an indemnity agreement and a mutual release were executed by Mrs. Myers and John J. Humphrey. On August 23, 1957, the Tax Ruling Division of the Internal Revenue Service issued a letter of revocation of the ruling of tax exempt status of petitioner retroactively to September 28, 1946. On May 24, 1960, petitioner filed suit in the United States District Court for the District of Columbia (Civil Action No. 1566-60) for cancellation of the "Certificate of Dissolution" and the "Agreement of Partnership" as void and ineffective. On August 17, 1961, the Court decreed

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* The factual statement is based upon a Stipulation of Facts filed in the Trial Court on October 5, 1964.

cancellation of the documents and the recordation. The Recorder of Deeds carried out the requirements of the decree. By letters dated April 28 and July 21, 1959, addressed to "John J. Humphrey, trading as Emerson Institute", the Internal Revenue Service demanded payment, with interest, of FICA taxes in the amount of $1,598.92, which petitioner paid under protest. Petitioner filed a timely claim for refund which was denied and suit was instituted. On September 12, 1961, petitioner applied to the Commissioner of Internal Revenue for a reinstatement of the Commissioner's ruling of tax exemption of June 22, 1945, retroactively to that date which was denied August 12, 1962. From May 15, 1941, when petitioner was first incorporated, until the present, Emerson Institute has continued to maintain substantially unchanged its basic method of operation as an educational institution offering courses leading to attainment of the equivalent of a high school diploma, and otherwise qualified for tax exemption under the applicable statute. All diplomas have been issued in the name of Emerson Institute and have been impressed by the same seal. All suppliers have billed the school as Emerson Institute and have been paid by Emerson Institute. All school catalogues have been issued in the name of Emerson Institute. The school has at all material times offered, and at present still offers, educational facilities at the high school level and is approved by the District of Columbia Board of Education. In the evening school the students are either adults who cannot be admitted to public high schools or minors who, because of economic reasons, are not able to attend school during the hours of public high school. The day school is composed almost entirely of teenagers.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals in this case, approving an inferential, interim dissolution in a manner other than that provided for by law, of an old and legally constituted private, eleemosynary educational institution, Emerson Institute the petitioner herein, by *ultra vires*, illegal and legally ineffective actions of its trustees, is a significant ruling in the important fields of Federal taxation, private education and trusts, and conflicts with the legal philosophy in these fields established in 1819 by this Court in *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518. This Court, after holding in that case that the charter of the College was a contract, said,

> "From the fact, then, that a charter of incorporation has been granted, nothing can be inferred which changes the character of the institution, or transfers to the Government any new power over it."

If an Act of a state legislature cannot change the charter or the character of the institution chartered, much less should the private acts of two men, acting contrary to law and public policy and in breach of their fiduciary duties, be allowed to effect such a change, even for the purposes of the Internal Revenue laws. The decision is also at odds with *United States* v. *Mount Vernon Mortgage Corporation*, 128 F. Supp. 629, aff'd 98 U.S. App. D.C. 429, 236 F. 2d 724, cert. den. 352 U.S. 988 (1957), which held that the illegal acts of trustees could not change the corporation's true tax status under the Internal Revenue Code during the relevant tax years.

The present decision of the Court of Appeals will leave all non-profit corporations organized to conduct educational institutions at the mercy of profit-minded trustees and liable to "revocations" of their tax-exempt status by unwarranted, legally insufficient, mistaken or venal acts of those trustees. This is not a "one-of-a-kind" case and the

decision can lead only to confusion in corporation, trust and tax laws, as well as in the conduct of private nonprofit schools.

The decision says: "In 1945, the appellant, as a nonprofit educational corporation, had been *granted* an exemption from federal taxes by the Internal Revenue Service." (Emphasis added). It is the law, not the Internal Revenue Service, which exempts "corporations . . . organized and operated exclusively for . . . educational purposes . . ." Int. Rev. Code of 1954, Sec. 501(c)(3); *Trinidad* v. *Segrada*, (1923) 263 U.S. 578. The language of the Code is mandatory and there is no discretionary power over this provision in the Internal Revenue Service. The decision says: "When the Internal Revenue Service learned belatedly of the 'dissolution' of the appellant as a corporation, it revoked the tax exemption because a partnership is not eligible for tax exemption under the provisions of Section 501 of the Internal Revenue Code of 1954". The corporation was not "dissolved" according to law and the Internal Revenue Service has and has had no power under the statute to "revoke" the exemption granted by law to corporations such as petitioner. The D.C. Code, Title 29, Chapter 7, provides the only machinery for the dissolution of a corporation. Since the corporation was not dissolved by the ineffective acts of the trustees, it kept its tax-exempt status under the law.

The opinion says: "Following the death of the 'partner' in 1953, the surviving 'partner' purchased the deceased 'partner's' interest from his estate." This was an impossibility. Simply stated, the facts are that, regardless of any recitations in executed documents, when "partner" Myers died in 1953, "partner" Humphrey "purchased" anything connected with the operation of the school which Mr. Myers had owned and which Mrs. Myers could sell and deliver. Mrs. Myers could not and did not sell anything that Mr. Myers and Mr. Humphrey had held as trus-

tees of the school. Mrs. Myers could not receive any of the assets of the school and neither Mr. Myers nor his wife, as executrix, could transfer title to any of the assets of the school. Mr. Humphrey, the "surviving partner" purchased nothing from her which had been held by the two men as trustees of petitioner. This Court said in the Dartmouth College Case: "The trustees have no beneficial interest to be protected."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition of a writ of certiorari should be granted.

Respectfully submitted,

Byron N. Scott
Attorney for Petitioner

Dated June 1, 1966